

Michigan Journal of Race and Law

Volume 10

2004

Challenging the Bounds of Education Litigation: *Castaneda V. Regents* and *Daniel V. California*

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Recommended Citation

Alan E. Schoenfeld, *Challenging the Bounds of Education Litigation: Castaneda V. Regents and Daniel V. California*, 10 MICH. J. RACE & L. 195 (2004).

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CHALLENGING THE BOUNDS OF EDUCATION LITIGATION: *CASTANEDA V. REGENTS* AND *DANIEL V. CALIFORNIA*

Alan E. Schoenfeld*

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INTRODUCTION

In the last three decades, educational institutions have witnessed extraordinary transformations brought about by litigation and judicial intervention in the name of educational equity. At the primary and secondary levels, these transformations have come primarily from desegregation and school finance equalization litigation,¹ while at the postsecondary level they have come from litigation surrounding affirmative action. Although these areas of law have almost entirely remapped the educational terrain, and the problems with which they concern themselves are nearly identical, they are rarely treated by scholars or

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1. See Caroline M. Hoxby, *Are Efficiency and Equity in School Finance Substitutes or Complements?*, 10 J. ECON. PERSPECTIVES 51, 51 (1996) ("[S]ince desegregation, the most important changes to American elementary and secondary schooling have almost certainly been in the realm of school finance.").

policymakers as being connected or interdependent.² Perhaps, as one higher education authority recommends, it is time for a more "honest conversation" about the relationship between secondary and higher education.³

A pair of lawsuits filed in California in 1999 force those concerned about educational equity and diversity in higher education to consider the legal and policy relationships between school finance reform in secondary education and affirmative action in higher education. The two lawsuits, *Castaneda v. Regents of the University of California*⁴ and *Daniel v. California*,⁵ challenged the use of Advanced Placement courses as a criterion for uni-

2. I have not encountered any academic or popular writing tackling the relationship between school finance reform and affirmative action. The consensus among scholars and advocates is that, despite a shared commitment to educational equity, school finance reformers and proponents of affirmative action have divergent tactics, are engaged at different levels of the federalist legal structure, and are forced to grapple with the differing place of school finance and affirmative action in the nation's political economy and social discourse. Michael Selmi describes the situation as follows:

[S]chools generally prefer to administer a bit of affirmative action rather than to subject their admissions procedures to scrutiny. Indeed, for years, the state of Texas exhibited a strong preference for affirmative action programs rather than revising the gross inequities that had long plagued its system of public school financing. One can only ask: what would the educational results be today if Texas had equalized its school funding in the early 1970s? And why has the debate over affirmative action been so much louder than the debate over school finance, which remains a stubborn, complex, and peculiarly local issue?

Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 1017 (1999).

3. Former University of California at Berkeley Director of Admissions Bob Laird has said that higher education policymakers fail to engage in "honest conversation" about the relationship between primary, secondary, and higher education. Rather, they "respond[] to political pressures in the most expedient way possible, which includes a kind of happy talk about the future. We're not acknowledging how complex and deep-rooted the problems [of diversity in higher education] are." Kenneth R. Weiss, *An Exploration of Ideas, Issues and Trends in Education: Q & A with Bob Laird*, L.A. TIMES, Oct. 6, 1999, at B2. More generally, education law scholars' failure to think across the education system mirrors the education community's failure to integrate primary, secondary, and higher education into one system both in theory and in practice. As Andrea Venezia, Michael W. Kirst, and Anthony L. Antonio note, "[S]tates have created unnecessary and detrimental barriers between high school and college." ANDREA VENEZIA, MICHAEL W. KIRST, & ANTHONY L. ANTONIO, *BETRAYING THE COLLEGE DREAM 2* (2003). The system need not function this way, however: "This is an American phenomenon: there is a much greater disjuncture between secondary and postsecondary education here than in most other nations." *Id.* at 14. For the most thorough discussion to date of the yawning gap between secondary and higher education, see *FROM HIGH SCHOOL TO COLLEGE: IMPROVING OPPORTUNITIES FOR SUCCESS IN POSTSECONDARY EDUCATION* (Michael W. Kirst & Andrea Venezia eds., 2004).

4. No. C99-0525 (N.D. Cal. filed Feb. 2, 1999).

5. No. B C214156 (L.A. Super. Ct. filed July 27, 1999).

versity admissions and the unequal distribution of Advanced Placement courses in California public high schools, respectively. These cases represent the intersection of two movements in the law of education that have heretofore existed as distinct and separate strategies for improving and integrating public education. Born in large part of the need for novel approaches to guaranteeing students of color access to higher education after Proposition 209 made affirmative action programs illegal in California, they represent a "third way" rejoinder to the traditional policy and legal framework for expanding access to postsecondary education.⁶ A more concerted effort to combine the strategies and substantive claims of the school finance reform and affirmative action movements should result in expanded access to higher education, particularly for economically disadvantaged students and students from historically underrepresented minority groups.

This Note argues that by combining the normative suasion of educational finance litigation with the political imperatives manifested in affirmative action law and practice, those who seek to improve the quality of secondary education and expand access to higher education would likely effect greater change than they would working independently. Under the appropriate political and legal circumstances, access to public higher education ought to be treated as something akin to a fundamental right, the unequal distribution of which constitutes a violation of equal protection for students of color and for economically disadvantaged students. Using the *Castaneda* and *Daniel* lawsuits to probe the rigid contours of school "finance" reform litigation and the overly formal conceptions of race-based preferences that pervade discourse about affirmative action, I argue that these cases provide promising examples of the ways in which advocates for diversity in higher education may capitalize on the political will of the people and the structure of the state system of public education

6. The movement for expanded access to higher education for students of color has traditionally and sequentially taken two forms. The first movement was directed towards traditional affirmative action programs in postsecondary education admissions, exemplified by what was litigated in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Gutter v. Bollinger*, 539 U.S. 306 (2003). The second movement came in the wake of assaults on traditional affirmative action. It comprised the evolution of "percentage plans," which guaranteed in-state college admissions to students who graduated in a specified top percentage of their high school class. For a discussion and critique of these programs, see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000). The "third way" I describe here bucks the trend of a singular focus on higher education outputs—that is, admissions rates of students of color—and shifts the focus to the inputs—the secondary preparation of college applicants and the alignment of that preparation with admissions criteria. Such a shift has been called for by radical critics of affirmative action like Susan Sturm and Lani Guinier. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 956 (1996) (arguing that the affirmative action debate has been truncated by narrow thinking and calling for "a more fundamental critique of existing selection and admission conventions").

to advance an agenda that simultaneously improves secondary education while diversifying institutions of higher education. Although this Note concentrates on two cases from California, it fundamentally concerns what advocacy for educational equity will look like throughout the country for the next generation of students of color and of economically disadvantaged students. These cases, though born of the particularities of California's state education system, do not embrace strategies unique to California. Rather they are harbingers of a promising nationwide trend.

This Note contains three parts. Part I outlines the structure of California's secondary and postsecondary education systems, highlighting features and policies crucial to the arguments advanced in this Note. It also outlines the status of California's education finance and affirmative action systems in 1999, when *Castaneda* and *Daniel* were filed. Part II discusses the *Castaneda* and *Daniel* litigations. Part III places the two lawsuits in a broad analytical and theoretical framework, drawing on analyses of the school finance reform and affirmative action movements. I argue that *Castaneda* and *Daniel* potentially portend a new generation of education-based civil rights litigation that will fuse the normative claims of school finance reform with the political imperatives of affirmative action.⁷ Finally, I compare these two lawsuits to similar litigation in Connecticut and New York to convey that the *Castaneda* and *Daniel* strategies are readily translatable across state boundaries and should be regarded as models of political acumen and not as irreplicable phenomena.

7. When I refer to the political imperatives of affirmative action, I mean to suggest that the contemporary racial and political economy of the United States engenders demands for strategies aimed at diversifying higher education and other institutions at the core of the nation's power structure. These imperatives are evident, for example, in the amicus briefs filed by the nation's military, industrial, and higher education leaders on behalf of the respondents in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Gutter v. Bollinger*, 539 U.S. 306 (2003). In those briefs, leaders from the various sectors of society contended that diversity in higher education was necessary because a "diverse workforce is essential to the success of global companies," Motion for Leave to File Amicus Curiae Brief and Brief of Exxon Mobil Corporation as Amicus Curiae in Support of Neither Party at 2, *Gutter* (No. 02-241), and because "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security." Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, *Gutter*, (No. 02-241). The Court paid special attention to these political imperatives in its decision in *Gutter*, quoting liberally from the briefs and embracing their central tenet that diversity in higher education is necessary for the political and economic health of the nation. See *Gutter*, 539 U.S. at 330-33; see also Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES, June 1, 2003, § 6 (Magazine), at 54 ("In both California and Texas, the political pressures to achieve racial diversity proved so overwhelming that when each state's universities were forbidden to take race into account in the admissions process, they simply refused to accept the decline in [B]lack and Hispanic enrollment that inevitably followed.").

I. EDUCATION LAW AND POLICY IN CALIFORNIA

To appreciate the legal and policy context of *Castaneda* and *Daniel*, one must look to the judicial decisions and legislative enactments that have shaped public education in California. This part discusses the structure of California's integrated kindergarten through college ("K-16") school system, California's long history of school finance litigation, and California's affirmative action law.

A. K-16 Education in California

As a result of demographic shifts and government largess in the middle of the last century, California boasts one of the most highly integrated primary, secondary, and higher education systems in the country.⁸ In 1960, confronted with a tidal wave of student enrollment stemming from the baby boom, California adopted a Master Plan for Higher Education⁹ that has since become "a national model that other states have tried to emulate."¹⁰ The Master Plan "defined state goals for higher education, assigned responsibility for achieving those goals, provided the necessary authority and resources, and by linking those goals to very visible and understandable commitments to the public, had a built-in mechanism of accountability."¹¹ It established a hierarchical three-tier system of universities, colleges, and junior colleges and guaranteed every California high school graduate the opportunity to enroll in one of the system's schools.¹² The oversight board has altered the admissions criteria for the three units on a regular basis to respond to the shifting demographics of the state's secondary school population and to ensure college access to all California students without compromising the academic quality of the institutions.

The state's guarantee that all students would have a place in a state-funded institution of higher education required an increased commitment on the part of the higher education community to public secondary education. Universities became deeply involved in the planning of primary and secondary school curricula and governance, as well as in myriad outreach programs that establish articulated pathways between high school

8. See Anthony Lising Antonio & Samuel H. Bersola, *Working Toward K-16 Coherence in California*, in FROM HIGH SCHOOL TO COLLEGE, *supra* note 3, at 31.

9. LIAISON COMM. OF THE STATE BD. OF EDUC. AND THE REGENTS OF THE UNIV. OF CAL., A MASTER PLAN FOR HIGHER EDUCATION IN CALIFORNIA, 1960-1975, at xi-xii (1960) [hereinafter MASTER PLAN].

10. Sara Hebel, *Schwarzenegger Strong-Arms Colleges*, CHRON. HIGHER ED., Apr. 9, 2004, at A21.

11. UNIV. OF CAL. MASTER PLAN ADVISORY GROUP, UNIVERSITY OF CALIFORNIA: A PERSPECTIVE ON DEVELOPING A NEW MASTER PLAN 2 (2002).

12. See MASTER PLAN, *supra* note 9, at 1-5.

and college.¹³ For example, in a 2002 report to the state legislature concerning revisions of the state Master Plan for Higher Education, a faculty advisory group noted that "[t]he University of California recognizes the reciprocal links that bind together its future with the quality of public elementary and secondary education in the state."¹⁴

These reciprocal links have become strained in recent years as the tension between failing to maintain rigorous standards at the secondary education level and achieving diversity at the higher education level has increased.¹⁵ As high schools become less capable of meeting their educational obligations, colleges have increasingly taken on a remedial role.¹⁶ As competition among institutions of higher education has reached new heights and the costs of remediation have skyrocketed, universities have become increasingly loath to dilute their standards in order to accommodate students whose academic preparation is lacking.¹⁷ Compounding these problems is the well-founded fear that without some sort of race-based affirmative action, California's higher education system will quickly homogenize at each of the three tiers.¹⁸

13. For example, the California Education Round Table established a programmatic arm, the Intersegmental Coordinating Committee ("ICC"), composed of faculty and students from all segments of the K-16 system. The ICC developed articulation documents and math and English standards for the system that attempted "to clarify the relationship between graduation standards and expected competencies for entering college freshmen." Antonio & Bersola, *supra* note 8, at 33.

14. UNIV. OF CAL. MASTER PLAN ADVISORY GROUP, *supra* note 11, at 1.

15. For colleges obligated to admit students from the states' high schools, those schools' academic failures threaten the colleges' ability to maintain rigorous admissions standards. Since most failing schools are composed predominantly of students of color and students from lower socioeconomic backgrounds, colleges striving for diversity feel the need to adapt admissions standards most acutely.

16. See Jennifer R. Rowe, *High School Exit Exams Meet IDEA—An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 B.Y.U. EDUC. & L.J. 75, 90 (noting that one-fourth of all college enrollees need remediation in at least one subject area). The most tempestuous debate about the role of remedial education at the college level came when the City University of New York ("CUNY") moved to phase out its remediation program in order to boost its academic prestige. Such a move is in keeping with a nationwide trend to make public higher education more stratified and exclusionary. For an incisive discussion of the CUNY controversy, see Patricia J. Gumpert & Michael N. Bastedo, *Academic Stratification and Endemic Conflict: Remedial Education Policy at CUNY*, 24 REV. HIGHER EDUC. 333 (2001).

17. See, e.g., Gumpert & Bastedo, *supra* note 16, at 337-42.

18. See, e.g., Richard Morgan, *California May Ban Extra Points for AP Courses*, CHRON. HIGHER ED., June 21, 2002, at A23. In the debate about whether or not to drop the GPA-enhancing effect of honors and Advanced Placement courses, the tension between universities' own educational missions and their obligations to primary and secondary education became clear. Those who supported the enhancements argued that high school students needed incentives to undertake challenging coursework before arriving at college to ensure that "the colleges will not make themselves high schools." *Id.* But the state legislature's

Two vectors have shaped the legal and public policy context of this dilemma. At the primary and secondary levels, the school finance reform movement has sought to improve the quality of education in the state's poorest schools. In higher education, various forms of affirmative action in the pre- and post-Proposition 209¹⁹ environment have attempted to ensure diversity in spite of clearly differential access to college preparatory resources throughout the state.

B. School Finance in California: The Promises of *Serrano v. Priest*

In 1971 the California Supreme Court ruled in *Serrano v. Priest*²⁰ that California's system of funding its public schools violated both the federal and state constitutions.²¹ Two years later, in *San Antonio Independent School District v. Rodriguez*,²² the United States Supreme Court ruled that a similar school funding system in Texas did not violate the United States Constitution, overruling the California Supreme Court's decision in *Serrano* with respect to federal law.²³ *Serrano*'s holding regarding the California constitution, however, remains good law.²⁴ As the second *Serrano*²⁵ court, which held the state legislature's remedy enacted in response to *Serrano I* to be similarly in violation of the state constitution, noted in 1976:

We—along with the trial court and the parties—think it is clear that *Rodriguez* undercuts our decision in *Serrano I* to the extent that we held the California public school financing system (if proved to be as alleged) to be invalid as in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. However, as we made clear in footnote 11 [of *Serrano I*], our decision in *Serrano I* was based

Joint Committee to Develop a Master Plan adopted a different conception of higher education's responsibilities, calling on the universities to "continue collaborating with [elementary and secondary] schools to increase the rigor of all academic courses to achieve the goals of reducing demand for remedial instruction among freshman students and eliminating the current practice of providing additional weight to honors and AP courses in admissions decisions." *Id.*

19. See CAL. CONST. art. I, § 31(a) (amended 1996) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

20. 487 P.2d 1241 (Cal. 1971) [hereinafter *Serrano I*].

21. *Id.* at 1244.

22. 411 U.S. 1 (1973).

23. *Id.* at 55.

24. See, e.g., *Butt v. California*, 842 P.2d 1240, 1249–51 (1992) (reaffirming *Serrano I*'s central holding that when the state undertakes to provide a good to which citizens have a fundamental right, it must do so on a substantially equal basis to all).

25. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) [hereinafter *Serrano II*].

not only on the provisions of the federal Constitution but on the provisions of our own state Constitution as well.²⁶

Thus, in spite of the Supreme Court's holding in *Rodriguez*, California was bound to provide primary and secondary education of a judicially mandated quality and on a substantially equal basis to all students in order to meet the demands of the state constitution's education and equal protection provisions.²⁷ This mandate has shaped California's education policy for over three decades.²⁸

The *Serrano* plaintiffs claimed that primary and secondary public education was a fundamental right in California, and, as such, it could not be denied to them on the basis of their membership in a suspect class founded on wealth.²⁹ California's system of funding public schools primarily on the basis of *ad valorem* property tax rates, the plaintiffs contended, discriminated against poor children.³⁰ Discrimination against members of a suspect class in the domain of a fundamental right triggered strict scrutiny, and the court found that the State did not meet its burden in defending the funding system as a narrowly tailored means of furthering a substantial government interest.³¹ In *Serrano II*, the Court summarized its *Serrano I* holding, thus:

For the reasons there stated and for the purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of the laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest.³²

26. *Id.* at 949.

27. *Id.* at 957-58.

28. See Jeannie Oakes, *Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California*, 43 SANTA CLARA L. REV. 1305, 1361-64 (2003) (describing the impact of *Serrano* on state education policy); see also William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REFORM 481, 489 (1995) (noting *Serrano*'s impact on state education financing and tax policy as a collateral effect of the constitutional mandate).

29. *Serrano I*, 487 P.2d 1241, 1255 (Cal. 1971).

30. *Id.* at 1244-45.

31. *Serrano II*, 557 P.2d at 952-53.

32. *Id.* at 951.

1. "Discrimination . . . on the Basis of District Wealth
Involves a Suspect Classification"

The *Serrano* courts, like many courts in the late 1960s and early 1970s, recognized poverty as grounding a protected class.³³ In this instance, the high degree of state and local government complicity in mediating the effects of wealth on educational resources compelled the court to regard school funding as discriminatory on the basis of wealth. The court said:

[W]e find the case unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity.³⁴

The court's concern about wealth-based distinctions increases in proportion to the government's involvement in the creation and perpetuation of legal and policy structures that unequally distribute public goods across the socioeconomic spectrum. This judicial solicitude is particularly well placed in the area of public education, where the mantra of "local control" betrays the extent to which state government is responsible for important features of schooling, such as the initiation and maintenance of districting, school funding schemes, and curriculum mandates.

2. "Education is a Fundamental Interest"

The court offered a capacious defense of public education that has shaped the legal debate concerning school resources in California ever since. According to the court:

[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an

33. See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (proffering an argument in favor of heightened protection for the economically disadvantaged).

34. *Serrano I*, 487 P.2d at 1254.

education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³⁵

Although the court limited its holding requiring equal funding of governmental services to education, it did not expressly limit its definition of education to primary and secondary education.³⁶ A lower court has since found that in *Serrano*, the California Supreme Court did not consider whether Californians have a fundamental right to higher education.³⁷ However the court suggested that it might recognize such a right if presented with adequate evidence or if defined by the legislature.³⁸

Demands for equal educational opportunity exert a great deal of "moral suasion."³⁹ The *Castaneda* and *Daniel* plaintiffs capitalized on the normative force of this movement by calling for equal access to higher education.

C. Affirmative Action in California

On November 5, 1996, Californians voted to amend their state constitution to outlaw racial (and other) preferences in public employment, public education, and public contracting by approving Proposition 209, provocatively titled the California Civil Rights Initiative.⁴⁰ Many regarded it as a staggering defeat for racial justice and diversity in higher education.⁴¹ Committed to equal access to higher education and recognizing the political impossibility of maintaining a predominantly White system of higher education in a largely Black and Latino state, the California higher

35. *Id.* at 1256-57 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

36. See *id.* at 1262-63 ("Although we intimate no views on other governmental services, we are satisfied that, as we have explained, its uniqueness among public activities clearly demonstrates that education must respond to the command of the [E]qual [P]rotection [C]ause.").

37. *Gurfinkel v. L.A. Cmty. Coll. Dist.*, 175 Cal. Rptr. 201, 204 (1981).

38. *Id.* at 203-04 n.3.

39. Avidan Y. Cover, *Is "Adequacy" a More "Political Question" Than "Equality?"*: The Effect of Standards-Based Education on Judicial Standards for Education Finance, 11 CORNELL J.L. & PUB. POL'Y 403, 405 (2002).

40. See CAL. CONST. art. I, § 31(a) (amended 1996).

41. See Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1149 (1996) (arguing that the color-blind vision of Proposition 209 would eventuate in "a uniform American culture, in which the culture of racial minorities and non[W]hite ethnicities are peripheral to mainstream life"); H.G. Reza, *Marchers Rally for Affirmative Action, Latino Rights Demonstration*, L.A. TIMES, Nov. 25, 1996, at B5 (describing a protest against Proposition 209 at which a speaker contended that supporters of the ballot measure "want us to pick the strawberries and work in hotels, but they don't want us to get an education").

education community searched furiously for race-neutral admissions procedures that would prevent a serious reduction in minority enrollment on the state's public university campuses.⁴²

The University of California ("UC") and California State University systems dropped race as a criterion in evaluating applicants in 1998, but they increased their outreach efforts to increase the number of minority applicants.⁴³ By the spring of 2002, the UC system admitted as many minority students as freshmen as it had before it abandoned formal affirmative action procedures.⁴⁴

The introduction of a percentage plan admissions schedule that guaranteed every student in the top four percent of her high school class admissions to at least one of the UC schools helped the universities match their pre-Proposition 209 minority enrollment.⁴⁵ Although the percentage plan dictated admissions to the UC system, students still had to apply to individual UC campuses, each of which had its own admissions criteria.⁴⁶ This admissions program satisfied the legal demands of Proposition 209 because it was facially neutral, not formally taking race into account.

The percent plan, however, will only maintain or increase diversity on UC campuses if the California public school system remains heavily segregated.⁴⁷ This percentage plan system also wrests a significant amount of discretion from UC admissions officials and places it in the hands of

42. Proposition 209 was challenged almost immediately in federal court. Upon challenge, all California institutions of public higher education were enjoined from implementing Proposition 209. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996). The Ninth Circuit then vacated the injunction and the Supreme Court denied certiorari without comment. See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

43. See, e.g., Sara Hebel, *Court Ruling Could End Outreach to Minority Students in California*, CHRON. HIGHER ED., Dec. 15, 2000, at A41.

44. Bob Laird, *Bending Admissions to Political Ends*, CHRON. HIGHER ED., May 17, 2002, at B11.

45. Patrick Healy, *U. of California to Admit Top 4% From Every High School*, CHRON. HIGHER ED., Apr. 2, 1999, at A36.

46. See *id.* at A36-37.

47. See Benjamin Forest, *A Policy That Depends on Segregation*, N.Y. TIMES, Mar. 29, 2003, at A11 (arguing that percent plans like the ones in California and Texas "ignore[] a forgotten reality of the Texas plan: access and diversity in universities will come at the price of continued segregation in high schools. Racial integration in primary and secondary schools was once a national priority; now segregation is a prerequisite for a new kind of politically correct 'affirmative action'"); see also Jeffrey Selinger, *What States Aren't Saying About the 'X-Percent Solution'*, CHRON. HIGHER ED., June 2, 2000, at A31, A33:

[C]ritics say the policies are cynical: By using high schools with large minority populations to yield more [B]lack and Hispanic students, the approach exploits educational segregation. . . . Proponents of affirmative action say that class-rank systems discourage states from integrating high schools, and that, in the end, the policies won't increase the number of minority students at public institutions.

high school teachers and guidance officers: The high schools effectively determine who will be admitted to UC campuses by their administration of grades, the singular determinant of admissions for the top four percent of each high school's students.⁴⁸ Indeed, the UC system distrusts the public schools enough to ask the schools for the top ten percent of students and then to perform their own ranking of the top four percent on the basis of grades in fifteen core courses.⁴⁹

Critics of the percentage plan initially understood it to signal the higher education community's complete abrogation of any responsibility for public education reform. By establishing the four percent admissions gateway without any demands that public high schools improve the quality of education offered, the University removed incentives for any substantive educational improvements.⁵⁰ If UC schools will accept the top four percent of students regardless of their pre-college preparation, critics reasoned, public high schools would lose any incentive to improve their offerings.⁵¹ "You're letting schools off the hook," accused John G. Davies, chairman of the Board of Regents of the University of California. "This does not raise the bar."⁵² Similarly, Abigail Thernstrom, a member of the United States Committee on Civil Rights, said, "We're playing little games to allow us to ignore the appalling racial gap in achievement in elementary schools, and this just continues to get these schools off the hook. These plans compound a moral problem that Americans should be up in arms about."⁵³

It seems that these anxieties were either misplaced or the disingenuous ranting of those intent on maintaining the post-Proposition 209 status quo in California. Following the marked shift of power between higher and secondary education initiated by the introduction of the percentage plans, concern in the California higher education community for the quality of public secondary education grew greatly. Regents and University administrators concerned about the possible dilution of academic quality on their campuses sought to exert as much pressure as possible on secondary schools to improve the quality of education they offered in order to shore up higher education's resources against the imminent tide of potentially under-qualified students.⁵⁴ For example, as a way of incentivizing students' pursuit of advanced work in secondary schools, the UC Regents adopted a policy of adding extra points for each honors or Advanced

48. Selingo, *supra* note 47, at A31-32.

49. *Id.* at A34.

50. Healy, *supra* note 45, at A37; Selingo, *supra* note 47, at A32.

51. Healy, *supra* note 45, at A37; Selingo, *supra* note 47, at A31.

52. Healy, *supra* note 45, at A37.

53. Sara Hebel, 'Percent Plans' Don't Add Up, *CHRON. HIGHER ED.*, Mar. 21, 2003, at A24.

54. *See id.*

Placement class taken in recalculating and reranking the grade point averages ("GPAs") of the top ten percent. The combination of this policy and the unequal access to college preparatory resources discussed above gave rise to the *Daniel* and *Castaneda* lawsuits.

II. LITIGATING FOR COLLEGE ACCESS

The *Castaneda* and *Daniel* lawsuits were predicated on a particular understanding of the place of higher education in contemporary American society. This Part therefore begins by arguing why higher education today should be treated akin to a fundamental right. It then describes the *Castaneda* and *Daniel* lawsuits in more detail, with particular attention paid to the ways the cases fit into the California education framework—encompassing its statutory, legal, and political elements. Moreover, this Part attempts to limn the lawsuits in such a way as to distinguish them from conventional school finance reform and affirmative action lawsuits. As neither case eventuated in a court judgment,⁵⁵ the discussion focuses on the institutional and legislative, rather than judicial, responses initiated by the litigation.

A. Higher Education As a Fundamental Right

At the center of the *Castaneda* and *Daniel* lawsuits is a belief that access to college is a fundamental right, necessary for students' actuation of their aspirations, if not simply their economic viability and social vitality. While higher education remains non-compulsory, the tectonic economic and political shifts of the last three decades have brought higher education more in line with the criteria the *Serrano* court used to determine that primary and secondary education were fundamental rights. The *Serrano* court held that education was a fundamental right because such "education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life."⁵⁶ Although higher education might not have met these criteria in the political economy of 1971, times have changed. In 2004, higher education is as much, if not more, a determinant of one's economic and social success and one's civic disposition as are

55. The consent decree in *Castaneda* was entered by the court on June 9, 2003. See Press Release, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Settlement Reached in Suit Over Discriminatory Admissions Process at UC Berkeley (June 17, 2003), available at <http://www.lccr.com/ucsettlement.doc>. There has been no court judgment issued in *Daniel*. See *infra* note 148.

56. *Serrano I*, 487 P.2d 1241, 1255–56 (Cal. 1971).

primary and secondary education.⁵⁷ As such, it might finally be possible to bring higher education within the ambit of the *Serrano* mandate.

In *Serrano*, the California Supreme Court recognized a fundamental right to public education in California based on five factors: (1) "education is essential in maintaining what several commentators have termed 'free enterprise democracy'—that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background;"⁵⁸ (2) "education is universally relevant;"⁵⁹ (3) "public education continues over a lengthy period of life—between 10 and 13 years;"⁶⁰ (4) "education is unmatched in the extent to which it molds the personality of the youth of society;"⁶¹ and (5) "education is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school."⁶²

The sole effort to apply these criteria to higher education was unsuccessful though not preclusive. In *Gurfinkel*, the plaintiff attempted to assert that the *Serrano I* right to public education included a fundamental right to higher education.⁶³ The California Court of Appeals found that the *Serrano* courts did not describe a fundamental right to higher education because *Serrano I*, which was reaffirmed by *Serrano II*, partly said that (a) education lasted from ten to thirteen years, and (b) education was compulsory.⁶⁴ Rather than holding that no fundamental right to higher education exists in California, the *Gurfinkel* court suggested that it might recognize such a right if the plaintiff provided evidence to support it or if the legislature defined it.⁶⁵ It seems that the requisite evidence is now available. While a full exposition of the application of the *Serrano* criteria to higher education is unnecessary here, it should be noted that they apply with certain force to higher education in the contemporary American

57. See JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, U.S. CENSUS BUREAU, *THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS* (2002) (noting that workers with a college degree earn nearly twice as much as those with only a high-school degree over a forty-year working life); see also Sidney Verba et al., *Race, Ethnicity and Political Resources: Participation in the United States*, 23 *BRIT. J. POL. SCI.* 453 (1993) (describing the positive correlation between higher education and civic participation, especially among minority racial and ethnic groups).

58. *Serrano I*, 487 P.2d at 1258–59.

59. *Id.* at 1259 ("Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education.").

60. *Id.*

61. *Id.*

62. *Id.*

63. *Gurfinkel v. L.A. Cmty. Coll. Dist.*, 175 Cal. Rptr. 201, 202 (1981).

64. *Id.* at 203.

65. *Id.* at 203–04 n.3.

political economy. As noted above, higher education is just as determinative, if not more so, of an individual's economic and civic utility in contemporary America as primary and secondary education used to be.⁶⁶ Indeed, even the California Court of Appeals has recognized the importance of higher education today. In *Kirk v. Board of Regents of the University of California*,⁶⁷ a challenge to durational residence requirements for attendance at state colleges, the court "fully recognize[d] the value of higher education." However, the court declined to accord it the same status as "food, clothing and shelter . . . [because] [t]he durational residence requirement for attendance at publicly financed institutions of higher learning do [sic] not involve similar risks [of 'great suffering and even loss of life.']"⁶⁸

The final *Serrano I* factor is the most difficult to refute. Higher education is not compulsory. Indeed, the *Gurfinkel* court's holding that higher education was not a fundamental right on the flimsy reasoning that, because *Serrano I* "address[ed] 'compulsory' public education continuing over a '10 [to] 13' year period, the court in *Serrano I* clearly was contemplating education ranging from kindergarten through grade twelve. Neither college nor community college education is compulsory."⁶⁹ While this is indisputably true, the compulsoriness factor ought to be outweighed by the gravity of the four other factors. The simple fact that a public good is not compulsorily consumed ought not to allow the state to distribute it on an unequal basis to those who seek to consume it, especially when their economic and political participation hangs in the balance.

No California court has directly determined whether formal access to higher education constitutes an affirmative right as embodied in the sweeping mandate of *Serrano I*.⁷⁰ Even if it is not determined to be such, it is likely, given the California courts' demonstrated regard for higher education, that they would consider it to be very important. In the context of the *Castaneda* and *Daniel* lawsuits, such a high regard for higher education is crucial. Had the lawsuits eventuated in full adjudication, the courts' regard

66. See *supra* note 57 and accompanying text.

67. 78 Cal. Rptr. 260, 266 (1969).

68. *Id.* at 266-67.

69. *Gurfinkel*, 175 Cal. Rptr. at 203.

70. The most significant movement in this area of law has come in relation to undocumented immigrants' access to higher education. A series of cases in the late 1980s and early 1990s challenged the state's requirement that undocumented immigrants pay non-resident tuition and fees to the University of California and California State University system. In those cases, "the court did not consider *subsidized* public university education to be a fundamental or even an important interest. Instead, the court decided that precluding undocumented students from being classified as residents furthered legitimate state interests, such as preferring to educate California's lawful residents and not subsidizing violations of law." Lucila Rosas, Comment, *Is Postsecondary Education a Fundamental Right? Applying Serrano v. Priest to Leticia "A,"* 16 CHICANO-LATINO L. REV. 69, 77 (1995) (emphasis added) (quotations and citations omitted).

for higher education would likely have been partially dispositive of its receptiveness to the plaintiffs' complaints, since equal protection complaints of the sort the plaintiffs make hinge in large part on the courts' determination of whether the good to which they are being denied access is one to which they have an affirmative fundamental right.

B. *Castaneda v. Regents*

In February of 1999, a coalition of students and organizations filed a class action lawsuit alleging that the admissions process at UC Berkeley violated the equal protection clause of the Fourteenth Amendment of the United States Constitution.⁷¹ Plaintiffs in *Jesus Rios v. University of California Regents*,⁷² later renamed *Castaneda v. Regents*, included rejected African American, Latino, and Filipino applicants to UC Berkeley;⁷³ three minority organizations representing future applicants to Berkeley;⁷⁴ and five legal advocacy organizations.⁷⁵

A review of the Berkeley admissions process is important to understand the substance of the lawsuit. The *Castaneda* plaintiffs challenged the Berkeley admissions process that was in place prior to the University of California's introduction of the percentage plan.⁷⁶ However the Berkeley admissions procedures did not change significantly after the plan's adoption, so the same claims of discrimination lodged against the pre-percent-plan admissions process would still pertain after its adoption.⁷⁷ All applicants to Berkeley—including those who superseded the percent-plan threshold

71. Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, *Jesus Rios v. Univ. of Cal. Regents* (N.D. Cal. 1999) (No. C99-0525) [hereinafter *Castaneda Complaint*].

72. *Id.*

73. At the time of the lawsuit, these students were attending college elsewhere.

74. The minority organizations included the Imani Youth Council of the Oakland NAACP, the California League of United Latin American Citizens, and the Kababayan Alliance, a Filipino high school student organization.

75. Mexican American Legal Defense and Educational Fund, NAACP Legal Defense and Educational Fund, Asian Pacific American Legal Center of Southern California, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and the ACLU of Northern California constituted the five advocacy organizations.

76. *Castaneda Complaint*, *supra* note 71, at 3.

77. Prior to the adoption of the percent plan, the University of California maintained general admissions criteria for all students. In order to be able to attend at least one UC campus, the University required that applicants "have taken certain college preparatory courses, that they achieve GPAs of 3.3 or above in those courses or, for applicants with lower GPAs, certain scores on the SAT or the American College Test ('ACT') standardized tests; and that they have taken certain SAT II standardized tests." *Id.* at 14. After the University adopted a percentage plan system, it merely substituted the four-percent class rank as the gateway criterion.

and were guaranteed admissions to one of the University's campuses, those from in-state who did not fall within the top four percent of their classes but were applying to Berkeley anyway, and those from out-of-state—are now assigned an academic score and a comprehensive score by admissions officers.⁷⁸ Forty percent of the admissions decisions are based solely on the academic criteria. The remaining sixty percent are filled based on a comprehensive score, which is determined by those six academic criteria plus personal characteristics and non-academic achievement. At least seventy-five percent of the academic score must be based on three academic criteria: “(1) ‘uncapped’ GPA, (2) scores on the Schoolastic Aptitude Test (‘SAT’), or the American College Test (‘ACT’), and three SAT II tests, and (3) college preparatory courses completed and the level of achievement in those courses, including Advanced Placement (‘AP’) and International Baccalaureate Higher Level (‘IBHL’).”⁷⁹ Prior to the adoption of this particular iteration of its admissions process, Berkeley capped GPAs at 4.0. However, crucial to the initiation of the *Castaneda* lawsuit, “under the current process, applicants can be assigned an ‘uncapped’ GPA higher than 4.0 if they have taken AP, IBHL, and UC-approved honors courses.”⁸⁰ Quite clearly, a student cannot have a GPA above 4.0 without the availability of advanced classes in the applicant's high school.⁸¹ Plaintiffs grounded their disparate impact claims on the differential access to these classes across the state.

The manner in which the Berkeley admissions process failed to accommodate the academic deficiencies of a significant portion of the state's public high school students prompted the *Castaneda* lawsuit. The plaintiffs challenged “the discriminatory failure of Defendants to give full and fair consideration to applications for undergraduate admission to the [U]niversity of California at Berkeley . . . from Plaintiffs and those they seek to represent.”⁸² Their disparate impact claim challenged admissions policies and practices “that, without adequate educational justification, disproportionately deny to qualified minority applicants, including Plaintiffs, an equal opportunity to compete for admission to undergraduate

78. *Id.*

79. *Id.*

80. *Id.*

81. The *Castaneda* plaintiffs noted:

UC Berkeley admitted approximately 47.3% of the applicants for Fall 1998 freshman admission who had GPAs of 4.0 or higher, including 43.2% (2,185 of 4,352) of those applicants identifying themselves as [W]hite; 39.7% (412 of 1,038) of those applicants identifying themselves as Chicano or Latino; 38.5% (89 of 231) of those applicants identifying themselves as African American; and 31.6% (156 of 494) of those applicants identifying themselves as Pilipino [sic] Americans.

Id. at 13.

82. *Id.* at 3.

studies.”⁸³ The plaintiffs contended that the University’s operative definition of academic merit was too narrow to accommodate the racially differential access to academic opportunities across the state.⁸⁴ They specifically objected to Berkeley’s granting of “unjustified preferential consideration to applicants who have taken certain courses that are less accessible in high schools attended largely by African American, Latino, and Pilipino [sic] American students.”⁸⁵ Further, they contended that admissions officers used even less formal criteria in a manner that discriminated against these groups: “Even the [admissions] policy’s provision for the admission of students who fail to meet academic eligibility requirements, called ‘admissions by exception,’ has been implemented by Defendants to disproportionately favor [W]hite applicants.”⁸⁶

Plaintiffs alleged that, in the wake of Proposition 209 and the University’s enactment of the Proposition’s prohibitions in the form of Resolution Special Policy 1 (“SP-1”),⁸⁷ Berkeley adopted a policy in which:

[i]n addition to explicitly prohibiting admissions readers from considering minority applicants’ racial and ethnic background in the admissions process, readers no longer rely on a mathematical formula to evaluate applicants. Instead, readers use their own discretion to assign scores to applicants after reading applicants’ files. The revisions to the policy have resulted in readers placing even greater emphasis on applicants’ standardized test scores and considering more favorably applicants who had greater access to courses not equally available to all California high school students.⁸⁸

As one of the plaintiffs’ attorneys, Katayoon Majd of the ACLU of Northern California, said, “UC Berkeley went far beyond ending affirmative action. It discriminated against students of color.”⁸⁹ Thus plaintiffs

83. *Id.*

84. *Id.* (“A more fair and complete definition of merit would create a more fair and equitable admissions process for all applicants.”).

85. *Id.*

86. *Id.*

87. Resolution SP-1 enshrined the anti-affirmative action language of Proposition 209 in University of California policy. The Resolution stated that “the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.” See UNIV. OF CAL. BD. OF REGENTS, POLICY ENSURING EQUAL TREATMENT: ADMISSIONS (SP-1) (approved July 20, 1995), available at <http://www.universityofcalifornia.edu/news/compreview/sp1.pdf>.

88. *Castaneda* Complaint, *supra* note 71, at 12–13.

89. Press Release, NAACP Legal Defense Fund, Settlement Reached in Suit Over Discriminatory Admissions Process at UC Berkeley (Jun. 17, 2003) (on file with author).

sought to enjoin Berkeley's admissions process and demanded that the school adopt:

less discriminatory alternatives . . . that are effective in selecting students in a manner consistent with UC Berkeley's mission of admitting students who demonstrate exceptional academic or personal achievement and talent, who will contribute to the campus community, and who will bring diversity of personal experience and background to the intellectual and cultural environment of the campus.⁹⁰

Castaneda, ultimately settled by a consent decree in June of 2003,⁹¹ initiated a several-years-long discussion and policy transition at Berkeley and on other UC campuses about the operational definition of merit in the system's admissions process. In May 2001, the UC Regents rescinded Special Policy 1, which prohibited the consideration of race and other personal criteria in University admissions, by passing Resolution 28 ("RE-28").⁹² Thereafter Berkeley was free to employ a wide range of academic and personal factors in its decision making process. Upon the recommendation of the faculty admissions committee, the administration adopted a "unitary" admissions policy that no longer differentiated between "academic" and "comprehensive" scores and that afforded admissions officers considerably more latitude in weighing the various factors they could consider in making admissions decisions. As the faculty committee's report explained, the unitary policy:

[i]s very similar to those we have used for the past five years in that . . . no single factor will have a pre-assigned weight, although academics will continue to predominate; and all achievements will be evaluated in context. The criteria to be

90. *Castaneda* Complaint, *supra* note 71, at 17.

91. See [Proposed] Consent Decree at 3–4, *Castaneda* (June 9, 2003) (imposing on UC Berkeley a number of reporting requirements, including data on admissions numbers disaggregated by race and ethnicity, as well as draft and final versions of their admissions procedures and admissions officer training materials; also retaining Yale psychologist Robert Sternberg as a consultant to the Berkeley admissions office to assist in evaluation of the school's operational definition of "merit").

92. RE-28 explicitly rescinded SP-1 and Special Policy 2 ("SP-2"), a similar resolution governing hiring and contracts in the University system. In passing RE-28, the Regents noted that they believed themselves to be in full compliance with the mandates of Proposition 209, as codified in the California State Constitution, CAL. CONST. art. I, § 31, but also that "some individuals perceive that the University does not welcome their enrollment at its campuses." See THE REGENTS OF THE UNIV. OF CAL., POLICY ON FUTURE ADMISSIONS, EMPLOYMENT, AND CONTRACTING POLICIES—RESOLUTION RESCINDING SP-1 AND SP-2 (approved May 16, 2001), available at <http://www.universityofcalifornia.edu/regents/policies/6031.html>; Minutes of the Regents of the University of California 1–3 (May 16, 2001) (unpublished manuscript, on file with author).

used in the new process are exactly the same as those used previously: none have been added and none have been removed, rather the two previous lists have been combined into a single set. . . . We believe that the unitary process will be both more transparent and more educationally sound than the current two-tier process, which requires that we draw artificially rigid lines between "academic" and "other" criteria. In addition, using a single score will streamline the process in that we do not have to repeat the ranking, tie-breaking, and selection process for each tier. This, in turn, will allow readers to devote more time to cases that are on the "border" between admission and denial.⁹³

Whether this system satisfies the mandates of Proposition 209 is a hotly contested topic. Indeed, a recent UC Regents report found that UC schools admitted Black and Latino students at slightly higher rates than their test scores would predict, and Asian American students at slightly lower rates.⁹⁴ Whether these disparities are a result of policies that contravene state law or are attributable to race-neutral factors is debatable and currently under investigation at the behest of John J. Moores, the Chairman of the Board of Regents. He is skeptical that the precipitous rise in minority enrollment following the enactment of the unitary admissions policy could result from a policy in compliance with state law.⁹⁵ Indeed, he has "alleged that admissions officers have been using the system's 'comprehensive review' admissions policy to skirt Proposition 209."⁹⁶

Regardless of the ultimate conclusions about the legality of the UC and Berkeley admissions processes,⁹⁷ it is evident that *Castaneda* exerted extraordinary pressure on the higher education community and spurred them to substantive change. The wording of the faculty's recommenda-

93. UC BERKELEY ADMISSIONS, ENROLLMENT, AND PREPARATORY EDUC. COMM., REPORT TO THE UC REGENTS ON BERKELEY'S ADMISSIONS POLICIES, PROCESSES, AND OUTCOMES 11 (2001).

94. UC ELIGIBILITY AND ADMISSIONS STUDY GROUP, FINAL REPORT TO THE PRESIDENT (Apr. 2004).

95. See Peter Schmidt, *U. of California Report Fails to Settle Debate Over Whether Racial Bias Occurs in Admissions*, CHRON. HIGHER ED., Apr. 30, 2004, available at <http://chronicle.com/prm/daily/2004/04/2004043001n.htm>.

96. *Id.*

97. The Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), seems to implicitly endorse the "comprehensive review" admissions program, which manifests the "truly individualized consideration" that Justice O'Connor regarded as the "hallmark[]" of a narrowly tailored plan." *Id.* at 334. Whether the Supreme Court's determination that such plans pass federal constitutional scrutiny will have any bearing on the debate around affirmative action in California, where the dispute centers on state constitutional provisions, is yet to be determined.

tions and the committee's insistence that all applications be evaluated "contextually" mean that admissions officers must pay special attention to the academic offerings and environment of the applicant's school community. These changes reflect Berkeley's commitment to diversity and its responsiveness to the particular claims made by the *Castaneda* plaintiffs regarding the contours of the school's admissions criteria and procedures.⁹⁸ Likewise a longstanding, unresolved discussion in the California State Legislature's Joint Committee to Develop a Master Plan for Higher Education regarding GPA bonuses for Advanced Placement classes reflects the extent to which *Castaneda* placed this issue on the public higher education agenda for the state.⁹⁹

C. Daniel v. California

A similar conjunction of individuals and organizations to the plaintiffs in *Castaneda* then filed an obvious complementary case, *Daniel v. California*, which challenged the unequal distribution of college preparatory resources throughout California's public high schools.¹⁰⁰ The ACLU filed the lawsuit on behalf of the Latino and Black students at Inglewood High School, a public school in California that, at the time, offered only three AP courses.¹⁰¹ Plaintiffs claimed that they were "being denied equal and adequate access to Advanced Placement ("AP") courses by the State of California and by the State's local school districts"¹⁰² in violation of the equal protection¹⁰³ and education¹⁰⁴ clauses of the California Constitution and California statutory laws. The State of California, the State Board of Education, the State Superintendent of Public Instruction, the Inglewood Unified School District, and the Acting Superintendent of the Inglewood Unified School District were all named as defendants.¹⁰⁵ The plaintiffs alleged that the denial of access to AP classes in the Inglewood schools was

98. Berkeley's unitary admissions process involved a significant amount of "norming," a process by which application readers learn to compare applicants both to the entire applicant pool and, more specifically, to other applicants from a given student's high school or community. Compare UC BERKELEY ADMISSIONS, ENROLLMENT, AND PREPARATORY EDUC. COMM., *supra* note 93, at 13 (describing evaluation criteria for students from "particularly strong schools") with *id.* at 14 (describing Berkeley's commitment to providing "some measure of opportunity to students from low-income and disadvantaged backgrounds").

99. See Morgan, *supra* note 18, at A23.

100. See Plaintiffs' Complaint at 1, *Daniel v. California* (L.A. Super. Ct. 1999) (No. B C214156) [hereinafter *Daniel Complaint*].

101. *Id.* at 4-5.

102. *Id.* at 1.

103. CAL. CONST. art. I, § 16.

104. CAL. CONST. art. IX, §§ 1, 11.

105. *Daniel Complaint*, *supra* note 100, at 1.

the product of a system-wide failure to protect the interests of Black and Latino schoolchildren.¹⁰⁶

AP offerings throughout the state were clearly unequal at the time of the lawsuit, and that inequality was closely tied to schools' ethnic and racial compositions. While some predominantly White and Asian high schools were offering multiple sections of more than fourteen different AP courses:

[m]any other California high schools offer[ed] only a single section of 2 or 3 different AP courses. 177 [of 1004] California high schools [did] not offer any AP classes. While these differences in AP offerings [were] related to several factors including school size and location, they [were] closely bound up with a high school's racial composition.¹⁰⁷

For example, predominantly White and Asian schools with between 500 and 1000 students offered an average of 3.57 AP courses, while similarly-sized predominantly Black and Latino schools offered only 2.07 courses on average.¹⁰⁸ Predominantly White and Asian schools with 2000 or more students offered 10.12 AP courses on average, while similarly-sized predominantly Black and Latino schools averaged only 6.75 AP courses.¹⁰⁹ In their complaint, plaintiffs cited the particularly egregious disparity between their high school and nearby Arcadia High School: Inglewood (97.4% Black and Latino) offered only three AP courses, none of which was in math or science, while Arcadia (8.4% Black and Latino) offered eighteen AP courses, including six in math and science.¹¹⁰ Moreover, nearly 130,000 students attended the 177 public high schools in California that did not offer any AP courses.¹¹¹

This disparity, plaintiffs claimed, was not due to a shortage of student interest.¹¹² Indeed, they contended that "when high schools offer an AP program and inform their student body about the advantages of taking AP courses, their students will enroll in these courses."¹¹³ They cited the example of Los Angeles' Garfield High School, made famous by the

106. *Id.*

107. JEANNIE OAKES ET AL., REMEDYING UNEQUAL OPPORTUNITIES FOR SUCCESSFUL PARTICIPATION IN ADVANCED PLACEMENT COURSES IN CALIFORNIA HIGH SCHOOLS: A PROPOSED ACTION PLAN 6 (2000) (report submitted to the court as part of the settlement discussions between parties in *Daniel*).

108. *Id.* at 7.

109. *Id.*

110. *Daniel* Complaint, *supra* note 100, at 5.

111. *Id.* at 4.

112. *Id.* at 8.

113. *Id.*

movie *Stand and Deliver*.¹¹⁴ In 1976, Garfield offered no AP math classes. Under the direction of teacher Jaime Escalante, the AP calculus program was established and grew exponentially.¹¹⁵ In 1986, 129 Garfield students took the exam and sixty percent of them earned college credits; "[t]hat year, only three high schools in the country had more students take the exam."¹¹⁶ Given such a success story, no matter how aberrant it may be, the plaintiffs contended that it was the:

Defendants' policy and practice of failing to assure equal and adequate access to AP course offerings to qualified high school students [that] create[d] substantial disparities in the quality and extent of educational opportunities, and further perpetuate[d] educational inequalities, particularly for students enrolled in predominantly Black and Latino schools.¹¹⁷

Thus "[b]y denying students who would enroll in AP courses if offered by their schools equal and adequate access to AP courses,"¹¹⁸ the defendants violated the students' equal protection rights and denied the students their right to California's guarantee of substantially equal educational opportunities.¹¹⁹

California's detailed statutory framework for education and its highly integrated secondary and post-secondary education system provided a fertile ground for the *Daniel* plaintiffs' claims. The extent to which California public institutions of secondary and higher education formally recognized AP courses as an important component of college preparation strengthened plaintiffs' equal protection and education clause challenges. As the complaint noted, "Advanced Placement courses are recognized by the California Education Code, education experts, and Departments of Education throughout the United States as an integral component of high school students' curricula."¹²⁰ Specifically, the *Daniel* plaintiffs cited the state's AP fee waiver program as evidence of the official integration of the AP program into the state's educational practice and administration.¹²¹ California Education Code Section 52240(b) establishes a fee-waiver program for Advanced Placement exams because "it is the intent of the Legislature . . . that certain state funding that currently is provided to school districts be made available to provide financial assistance to economically disadvantaged

114. *STAND AND DELIVER* (American Playhouse 1988), cited in *Daniel* Complaint, *supra* note 100, at 8.

115. *Daniel* complaint, *supra* note 100, at 8.

116. *Id.*

117. *Id.*

118. *Id.* at 9.

119. See CAL. CONST. art. I, §§ 7, 16; art. IX, §§ 1, 5.

120. *Daniel* Complaint, *supra* note 100, at 2.

121. *Id.* at 17–19.

pupils in the payment of [A]dvanced [P]lacement examination fees."¹²² If their tax dollars subsidized the AP exam fees of economically disadvantaged students, the plaintiffs reasoned, then denying them access to AP classes and exams was tantamount to forcing them to fund discrimination against themselves.¹²³

Similarly, the high level of integration of California's secondary and higher education systems worked within a statutory framework that manifested an extraordinary solicitude towards students' college preparedness. Consequently, the plaintiffs were able to marshal a large amount of evidence that the state regarded college preparatory curriculum in general, and AP exams in particular, as an important component of secondary education.¹²⁴ Specifically, they referred to California Education Code Section 51228(a), which requires all California school districts to offer "a curriculum that meets the requirements and prerequisites for admission to the California institutions of post-secondary education."¹²⁵ Although the statutory language clearly mandates that students have access to a curriculum that prepares them for *any* of the state's institutions of higher education, including the junior colleges, colleges, and universities, the plaintiffs asserted that they had an affirmative right to access to "a curriculum that meets the admission requirements of the University of California's most competitive campuses."¹²⁶

The plaintiffs' claim also relied, in part, on the anti-tracking¹²⁷ language in Section 66204 of the Education Code, which states that "there shall be no policy or practice in any public elementary or secondary school of directing, especially for cultural or linguistic reasons, any pupil . . . away from choosing programs that prepare that pupil academically for college."¹²⁸ The mandatory college access provision, coupled with this explicit guarantee against tracking, seemed to militate against a college preparatory curriculum that did not adequately prepare high school students for acceptance to the flagship campuses of the California higher education system.

122. *Id.* at 17.

123. *Id.* at 18.

124. *Id.* at 23-24.

125. *Id.*

126. *Id.*

127. Tracking "is the practice of placing students in stratified classes . . . based on the students' perceived abilities." Kevin G. Welner, *Ability Tracking: What Role for the Courts?*, 163 W. ED. LAW REP. 565, 565 (2002). See generally JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* (1985). This provision guarantees that no student will be tracked into an academic program that is insufficient to prepare him or her for higher education.

128. *Daniel Complaint*, *supra* note 100, at 16-17.

Finally, no doubt taking their cue from *Castaneda*, the *Daniel* plaintiffs attacked the manner in which the state's higher education system used AP exams to further disadvantage already disadvantaged students.¹²⁹ The UC system, plaintiffs contended, used:

the AP program in four distinct ways: by increasing the GPAs of applicants who took AP classes; by granting full college credit to students who obtained a score of 3 or higher on the AP test; by allowing AP students to place out of introductory courses; and by giving preference to applicants who took advanced courses.¹³⁰

This state-sanctioned privileging of one particular type of curriculum over another, especially within a context of radical inequality in access to that curriculum, formed a strong basis for the *Daniel* complaint and successfully tied it in with the lobbying efforts that followed the *Castaneda* lawsuit.

The response to *Daniel* was overwhelmingly positive, even from the most unexpected sources. School administrators and other public officials praised the student plaintiffs as heroes; following an ACLU press conference, "none other than Inglewood Mayor Roosevelt Dorn proclaim[ed] [the plaintiffs] local heroes, models of courage."¹³¹ Similarly, Rhuenette Montle, acting superintendent of the Inglewood schools and a named defendant, averred that the plaintiffs' "goals were altruistic as they took steps to improve the quality of education for students in Inglewood and in similar districts."¹³² One education commentator recognized that this lawsuit was "designed as a test case to force a change in school practices throughout California."¹³³ "Enlightened school districts," suggested education professor Jeannie Oakes, "will welcome the pressure [from the lawsuit] to upgrade the quality of their curriculum."¹³⁴

The parties quickly began to negotiate a settlement that would remedy the unequal distribution of AP courses and prove the commitment of the California public schools to their most disadvantaged students. In August of 1999, plaintiffs consulted with Jeannie Oakes and requested that she "assemble an independent team of experts to study the issues concerning inequities in access to Advanced Placement courses and recommend a remedy that would effectively address those inequities

129. *Id.* at 29.

130. *Id.* at 30.

131. Louis Sahagun, *Students in Lawsuit Are Cast as Heroes*, L.A. TIMES, Aug. 4, 1999, at B2.

132. Mary Reese Boykin, *Does Opportunity Knock Equally?*, L.A. TIMES, Aug. 14, 1999, at A15.

133. *Id.*

134. Louis Sahagun & Kenneth R. Weiss, *Bias Suit Targets Schools Without Advanced Classes*, L.A. TIMES, July 28, 1999, at A1.

identified.”¹³⁵ The UC experts’ report¹³⁶ identified the reasons for the unequal access to AP courses in California schools. As summarized in the plaintiffs’ status report, the experts concluded that:

“it is indisputable that having access to a minimum number of AP classes is a necessary condition for most California students to gain access to the state’s most selective universities”.... [T]hese experts strongly emphasized that although huge disparities in AP offerings existed among California’s high schools, particularly disadvantaging students of color and low income students, simply requiring a minimum number of AP courses at each school is not sufficient if other conditions for success in these courses are not met. The experts concluded that students attending comprehensive high schools serving predominantly low-income African American and Latino students have substantially less meaningful access to AP offerings than do students at schools serving predominantly White and middle [class] populations.¹³⁷

In addition to disparities across schools, the experts also examined unequal access within schools. Numerous California schools with substantial space constraints have adopted multi-track systems, which were introduced as a way to accommodate growing school populations.¹³⁸ Schools are often divided into three tracks, each of which has its own curricular structure and academic calendar.¹³⁹ Though they were not intended to be balkanized by ability grouping, students inevitably became tracked by assumed ability as school administrations attempted to formulate homogeneous student groupings for ease of instruction.¹⁴⁰ Depending upon the student composition of the track, higher-level classes may not be offered. Therefore, multi-track schools, which are predominantly large and racially diverse, “create obstacles for African American and Latino students to participate in AP course offerings. As a consequence, African American and Latino students commonly participate in AP classes far less often than do [W]hite and Asian students within multi-racial campuses.”¹⁴¹

135. Plaintiffs’ Status Report of September 13, 2000 at 7, *Daniel v. California* (L.A. Super. Ct. 1999) (No. B C214156) [hereinafter *Daniel* Status Report].

136. Along with Oakes, the study was written by UC Los Angeles education professors John Rogers, Patricia McDonough, and Daniel Solorzano; Pedro Noguera of UC Berkeley; and Hugh Mehan of UC San Diego.

137. *Daniel* Status Report, *supra* note 135, at 8 (citations omitted).

138. *Id.* at 9–10.

139. *Id.*

140. *Id.*

141. *Id.* For example, in the Los Angeles Unified School District, nineteen of the forty-nine schools are on a three-track system. David Pierson, *The Bad Side of ‘B-Tracks’*

To remedy these problems, the experts proposed the creation of a competitive grant program for California public high schools to stimulate the growth of AP programs in school districts with deficient college preparatory course offerings.¹⁴² Through a process of education and advocacy, the *Daniel* plaintiffs devised an Advanced Placement spot bill entitled "Advanced Placement Program Equal Opportunity Act," and California State Senator Martha Escutia submitted a modified form of the spot bill in the Senate Education Committee on February 15, 2000.¹⁴³ The governor of California signed a modified form of that bill into law on July 5, 2000.¹⁴⁴

The law establishes an Advanced Placement Challenge Grant program, which awards substantial grants to public high schools that attempt to improve their AP offerings.¹⁴⁵ The grants support the establishment of infrastructure components—for example, professional development of AP teachers and counselors, articulation of pathways for students from middle school through high school, academic support for AP students, and parental notification of AP availability and the availability of AP exam fee waivers—in public high schools, giving preference in grant provision to those schools with the poorest AP programs.¹⁴⁶ Furthermore, to stanch the effects of tracking on AP availability, the law mandates a minimum number of AP courses per in-school track for each funding group.¹⁴⁷

The law is notable for its holistic view of the AP program; it accommodates grant proposals for numerous "soft" features of curriculum development and school structure necessary to give students not just formal but also meaningful access to AP classes. The law includes notification of AP class offerings, articulated pathways from middle school through high school for students intent on taking the classes, and summer preparatory classes.¹⁴⁸

Criticized, L.A. TIMES, Dec. 8, 2002, at B1. And, "[o]f the 593 Advanced Placement courses offered at the district's 19 year-round high schools, 232 are on A-track, 216 are on C-track and 145 are on B-track." *Id.* ("School officials said they are often forced to stack high-achieving and low-achieving courses onto separate calendars at crowded schools because they don't have the resources to spread them evenly throughout a multi-track system."). For a general discussion of school tracking and its effects on equality of opportunity among students, see OAKES, *supra* note 127.

142. *Daniel* Status Report, *supra* note 135, at 8.

143. See CAL. S.B. 1504, 1999–2000 (Cal. 2000).

144. See CAL. S.B. 1689, 1999–2000 (Cal. 2000).

145. *Id.* at 3.

146. *Id.* at 3–5.

147. *Id.* at 5.

148. See generally CAL. S.B. 1689, 1999–2000 (Cal. 2000). According to Mark Rosenbaum, an attorney with the ACLU of Southern California who worked on the *Daniel* case, parties are still, as of November 19, 2004, in negotiation regarding the final details of the settlement, and no judgment has yet been entered by the court. Telephone Interview with Mark Rosenbaum, Legal Director, ACLU of Southern California (Nov. 19, 2004).

III. *CASTANEDA* AND *DANIEL* IN CONTEXT

The literature on *Castaneda* and *Daniel* is sparse, no doubt in part because scholars are uncertain how to classify the cases or under which narrow academic rubric they might fall. The cases defy the conventional taxonomy of education-based class action civil rights lawsuits. Rather, they are hybrid cases that fuse the claims of school finance reform and affirmative action cases by targeting the maldistribution of a particular educational resource on the grounds that the denial of that resource deprives students of the opportunity to compete for admission to competitive colleges. In doing so, they merge the normative claims of school equalization litigation with the moral and political imperatives that drive efforts to diversify higher education. And more importantly, they capitalize on California's proven political commitment to preserving diversity in higher education in the wake of Proposition 209.

This section attempts to situate *Castaneda* and *Daniel* in a broad analytical and theoretical context by discussing the ways in which the lawsuits challenge the overly wooden and formal notions of educational equity and adequacy that pervade school finance reform lawsuits, as well as challenge the rigid contours of the debate about affirmative action and diversity in higher education. This section also draws on the literature surrounding school finance reform in Connecticut and New York to illustrate the non-singularity of the California cases. While the strategies in these cases were tailored to take advantage of a specific amenable statutory framework and political atmosphere, *Castaneda* and *Daniel* are instructive for advocates across the United States as they attempt to fashion creative litigation strategies and judicially enforceable remedies for the states' educational ills. The lawsuits counsel not only special attention to the particular contours of state education law and politics but also share an imagination of how to work within that framework.

A. *Defining Educational Equity*

The first generation of school finance litigation to arise in the state courts attempted to equalize school funding across districts.¹⁴⁹ These cases were premised on the idea that equal funding would engender equal educational opportunity, a concept known as "equalization" through which society can "use education to raise the life chances of the least advantaged (as far as possible) up to those of the most advantaged."¹⁵⁰ As the deficiencies

149. See Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

150. AMY GUTMANN, *DEMOCRATIC EDUCATION* 131 (1999).

of an equal funding model became increasingly apparent,¹⁵¹ school finance litigation markedly shifted towards adequacy claims which sought sufficient educational funding to guarantee all students "functional literacy," the "attainment of the skills and knowledge essential for effective functioning in one's society."¹⁵² Contemporary school finance lawsuits almost invariably involve some mix of equity and adequacy claims and so focus almost exclusively on reforming the way public education is financed.¹⁵³

Though not articulated in this manner, the claims advanced in *Castaneda* and *Daniel* represent a detailed version of what school equity might actually mean. The school finance litigation movement has dominated public discourse over the equalization of educational opportunity in the past three decades, and proponents of the movement have cast that equalization in strictly fiscal terms.¹⁵⁴ But as Professor James E. Ryan explained, "There is no reason . . . why the rights recognized in these [school finance reform] cases must be defined solely in monetary terms, nor why the remedy for their violations must be limited to funding."¹⁵⁵ Rather, because the right to an equal or adequate education is an affirmative right:

[t]hese rights obligate the state to provide a constitutionally sufficient education to all students. If courts are going to enforce such a right, as a significant number of state courts are currently doing, they necessarily must articulate or embrace some definition of an equal or adequate education. Up until now, courts have embraced the plaintiffs' definition of the constitutional right and have generally equated sufficient funding with a constitutional school system. Providing adequate or equal funding may be one way for the state to fulfill its affirmative duty, but it is surely not the only way.¹⁵⁶

Defining the scope of what comprises an equal or adequate education is, it seems, limited only by a plaintiff's imagination.

To illustrate his conception of the potentialities of school finance reform, Professor Ryan turned to Connecticut's most recent school reform case, *Sheff v. O'Neill*.¹⁵⁷ In *Sheff*, the Connecticut Supreme Court held that "the devastating effects that racial and ethnic isolation, as well as poverty have had on the[] education" of the students in the Hartford public schools constituted a violation of the state constitution's education, equal

151. See Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 175 (Helen F Ladd et al. eds., 1999).

152. GUTMANN, *supra* note 150, at 147.

153. *Id.* at 128, 139–40.

154. James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 253–54 (1999).

155. *Id.* at 308.

156. *Id.*

157. 678 A.2d 1267 (Conn. 1996).

protection, and segregation clauses.¹⁵⁸ The court ordered the state legislature to fashion a statewide remedy to reduce school segregation and improve the quality of education in the state's cities.¹⁵⁹ Ryan argued that "*Sheff* demonstrates, albeit indirectly, that school finance litigation need not be solely concerned with the redistribution of resources."¹⁶⁰ The vast majority of states adopted, and continue to adopt, financial redistribution schemes as remedies in these types of lawsuits because such schemes were the remedies sought by the plaintiffs.¹⁶¹ But, as Ryan explained, courts have had considerable latitude in devising remedial schemes and, at the provocation of imaginative plaintiffs, they have felt, and should continue to feel, free to make educational policy.¹⁶² As Ryan noted:

That courts necessarily 'make' educational policy in articulating constitutionally guaranteed rights is perhaps best illustrated by several state court decisions holding that students have a right to an adequate education. The high courts of Kentucky, West Virginia, Massachusetts, and North Carolina have been thorough and explicit in defining the content of an adequate education—listing no fewer than seven detailed aspects of an adequate education. These courts obviously must have some notion of what counts as an education in order to explicate . . . aspects of an adequate education—such as sufficient knowledge of one's 'mental health'—are included within the courts' definition, and others—such as sufficient exposure to those of different backgrounds and cultures—are excluded.¹⁶³

Likewise the demands of the *Daniel* plaintiffs easily fit within the broad rubric of potential school equity remedies. The *Serrano* decisions established a capacious framework for determining what elements of schooling must be equalized across districts. Surely in this competitive economy, access to higher education constitutes "a principal instrument . . . in preparing [a student] for later professional training, and in helping

158. *Id.* at 1270.

159. *Id.* at 1290.

160. James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 541–42 (1999).

161. *Id.* at 547–48.

Presented with no alternatives, courts striking down school finance systems have . . . equated sufficient funding with a constitutional school system. There is no reason, however, why the rights need to be defined solely in monetary terms or remedied solely by increasing funding, especially in light of the demonstrated inefficacy of increased expenditures.

162. *See id.* at 554.

163. *Id.* at 548–49.

him to adjust normally to his environment.”¹⁶⁴ Likewise, “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity” to obtain higher, rather than simply primary and secondary, education.¹⁶⁵

While it is clear that every high school student in California has formal access to higher education, such access is meaningless unless it comprises an equitably distributed opportunity to enroll in each of the tiers of higher education. It is no great act of state government munificence to guarantee students admissions into a heavily tracked system of higher education. As Jeannie Oakes and John Rogers noted, “[t]he underlying principle of equal educational opportunity dictates that students attending any public high school in the state of California should have a reasonable opportunity to become competitive for admission to any public institution of higher education in the state.”¹⁶⁶ Embracing the *Serrano* courts’ rubric for limning the contours of educational equity in California, the *Castaneda* and *Daniel* plaintiffs each undertook to change one particular element of a system riven with inequality. They succeeded because they tailored their strategy to the favorable political climate in California at the time.

B. Post-Proposition 209 Politics in California

To civil rights advocates, Proposition 209 portended the death of racial equality in California and a return to segregated schooling as students of color were denied access to higher education.¹⁶⁷ But legislative and institutional action in the years following the proposition’s passage suggests just the opposite. The admissions reforms initiated in the wake of Proposition 209 and the introduction of numerous education reforms by the state legislature and institutions of higher education suggested that California voters and policymakers intended to roll back the racially dilutive effects of race-blind state practices as quickly as possible.¹⁶⁸ Indeed, one study of voter intent in the case of Proposition 209 concluded that:

voter intent surrounding the initiative, when properly analyzed, expresses the people’s desire for a more expansive interpretation of civil rights protections than advocated by supporters of the initiative and expressed through current judicial decisions. Specifically, voter intent indicates that voters

164. *Serrano I*, 487 P.2d 1241, 1256 (Cal. 1971).

165. *Id.*

166. JEANNIE OAKES & JOHN ROGERS, THE NEED TO MONITOR THE EFFECTS OF SB 1689 TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY: SUPPLEMENTAL REPORT 2 (Aug. 31, 2000) (on file with author).

167. See *supra* note 41 and accompanying text.

168. See Rosen, *supra* note 7, at 54.

wanted Proposition 209 to protect against preferences that are exclusionary and have a racially disparate impact even if they are not intentionally discriminatory.¹⁶⁹

Castaneda and *Daniel* were filed in a political climate welcoming to efforts at reversing the immediate results of Proposition 209's injunction against race consciousness in university admissions. Both the higher education community and the legislature met the students with unmitigated alacrity. As Charles R. Lawrence III explained, the conventional elite university response, "[w]hen confronted with the stark inequalities of our nation's elementary and secondary education systems," is to "argue that institutions of higher learning are neither responsible for nor capable of correcting those inequalities."¹⁷⁰ UC Berkeley's response to the challenges posed by *Castaneda* and *Daniels*, however, was just the opposite. Its initiation of a comprehensive admissions overhaul to align its review criteria with the realities of inequalities in California public high schools betrays a deep solicitude for the quality of education in the state.

Likewise the legislative response to the lawsuits indicates that the state was inclined to remedy educational inequalities without judicial intervention. In a letter circulated to California senators and assemblymen, *Daniel* plaintiffs' attorney Mark Rosenbaum averred that "legislative resolve is the most efficacious answer for California children" in remedying the inequalities targeted in the lawsuit, and he encouraged legislators to implement "a comprehensive program which will genuinely ensure that all students be given an equal opportunity to enroll in challenging college preparatory courses."¹⁷¹ The speed with which the Advanced Placement Challenge Grant program¹⁷² was introduced and the minimal legislative dissent that accompanied it are evidence of the legislature's willingness to remedy educational inequality even absent judicial mandate.

A strong contributing factor to this relative ease is that improving access to higher education is one of the more politically attractive forms of education reform across the country, especially in a state like California, which has proven its commitment to providing students with both formal and meaningful access to higher education. As *Los Angeles Times* education columnist Sandy Banks commented, access to college preparatory curriculum is "often regarded as a barometer of our commitment to high

169. Richard Frankel, Note, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 433 (2000).

170. Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 973 (2001).

171. Letter from Mark Rosenbaum, Legal Director, ACLU of Southern California, to Sam Aanstad, California Assemblyman (Feb. 21, 2000) (on file with author).

172. See *supra* notes 142-48 and accompanying text.

expectations.”¹⁷³ In other states where school reform has taken an unconventional shape, popular support has varied widely, jeopardizing some school reform programs that embrace controversial or unpopular theories. For example, resistance to desegregation has hampered efforts to implement *Sheff* in Connecticut, and anxieties about the cost and pedagogical effects of whole-school reform have limited the impact of the *Abbott v. Burke*¹⁷⁴ decision in New Jersey.¹⁷⁵ California’s experience with *Castaneda* and *Daniel* suggests that when school reform efforts are tied to well-established state prerogatives and preferences, they can have remarkable success with only minimal judicial intervention.

Clear problems, however, do exist with the California approach. Appeals to improve AP offerings are fundamentally elitist in that they attempt to improve education for the highest echelons of a given school while doing nothing to improve schooling for the lowest-performing students. Some critics have also expressed concerns about the potential dilution of the AP program as a greater number of less-prepared students participate in it.¹⁷⁶ These reasonable concerns notwithstanding, the lawsuits successfully undertook to remedy clearly discriminatory policies. It seems, then, that the political perceptiveness manifested in *Castaneda* and *Daniel* should be replicated elsewhere. The specificity of the California system should pose no hurdle to imaginative advocates, as each state’s political, educational, and judicial context will give rise to particular prudent strategies.

New York’s current school finance litigation is one promising example of such replication. Following the bench trial in *Campaign for Fiscal*

173. Sandy Banks, *AP Courses That Look Good—On Paper*, L.A. TIMES, Jun. 25, 2002, at E1.

174. 495 A.2d 376 (N.J. 1985). *Abbott* was a challenge to New Jersey’s school financing provisions. The litigation has reached the state’s highest court five times over nearly twenty years.

175. See Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey’s Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL’Y REV. 615 (2004); Lauren A. Wetzler, *Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut*, 22 YALE L. & POL’Y REV. 481 (2004).

176. See Rebecca Trounson & Richard Lee Colvin, *Rapid Growth of Advanced Placement Classes Raises Concerns*, L.A. TIMES, Apr. 7, 2002, at A1:

[T]he program’s tremendous growth—fueled by government subsidies and the owner’s aggressive promotion—is generating widespread concern among education experts, admissions officers, counselors, teachers, and even some students. They fear that some AP classes don’t live up to the program’s own high standards or prepare students to enter college with advanced standing.

See also Banks, *supra* note 173, at E1 (describing an AP chemistry class in Los Angeles in which many of the students “read at grade-school level, and couldn’t do basic algebra. Some refused to read outside of class and most of them balked at homework assignments. And these were high-achieving students at the inner-city school”).

Equity v. New York,¹⁷⁷ Justice Leland DeGrasse of the New York Supreme Court issued a ruling outlining the baseline for a “sound basic education”¹⁷⁸ and ordered the state legislature to fashion a funding scheme to guarantee at least this basic education to all students. The state education system, he held, must provide sufficient education to guarantee that all students have an opportunity to become “engaged, capable voter[s]” and jurors capable of deciding “complex matters.”¹⁷⁹ In imposing such a floor on the quality of education, DeGrasse attempted to legitimate his decision in the eyes of New Yorkers, whom he presumed to be solicitous about the functioning of their democratic and legal systems. His intuitions were confirmed by the public’s reaction to the Appellate Division of the State Supreme Court’s reversal of his decision. In that decision, the Appellate Division held that the education clause mandated only an eighth-grade education, which, the Court reasoned, would allow all students to “get a job, and support oneself, and thereby not be a charge on the public fisc.”¹⁸⁰ New York City officials were appalled at the decision, and newspapers

177. 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

178. While the education clause of the New York State Constitution provides only that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated,” N.Y. CONST. art. XI, § 1, the State Court of Appeals interpreted the article to require “a sound basic education” in the State’s first education finance reform case, *Levittown Union Free School District Board of Education v. Nyquist*, 453 N.Y.S.2d 643 (N.Y. 1982).

179. 719 N.Y.S.2d at 485. DeGrasse explained:

Productive citizenship means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably. It connotes civic engagement. An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few. Ballot propositions in New York City, such as the charter reform proposal that was on the ballot in November 1999, can require a close reading and a familiarity with the structure of local government.

Similarly, a capable and productive citizen doesn’t simply show up for jury service. Rather she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts and new ways to communicate and reach decisions with her fellow jurors. To be sure, the jury is in some respects an anti-elitist institution where life experience and practical intelligence can be more important than formal education. Nonetheless, jurors may be called on to decide complex matters that require the verbal, reasoning, math, science, and socialization skills that should be imparted in public schools. Jurors today must determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics.

Id. (emphasis omitted).

180. Campaign for Fiscal Equity v. New York, 744 N.Y.S.2d 130, 138 (N.Y. App. Div. 2002).

vitriolically condemned it.¹⁸¹ Governor George Pataki's endorsement of the court's decision became a major issue in his campaign for reelection.¹⁸² When the case finally reached the state's highest court, DeGrasse's reasoning was vindicated. The New York Court of Appeals agreed:

[w]ith the trial court that students require more than an eighth-grade education to function productively as citizens, and that the mandate of the Education Article for a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level. In *CFE* [the trial court decision] we pointed to voting and jury service because they are the civic responsibilities *par excellence*. For reasons founded in the American historical experience, the statutory requirements for participation in those activities are aimed at being inclusive. . . . Yet it cannot reasonably be supposed that the demands of juror service, and any related demands on the City schools, have become less rigorous, or that the concept of a sound basic education would not include literacy.¹⁸³

The New York legislature is currently fashioning a remedy meant to provide all of the state's public school students with an education that meets this mandate.¹⁸⁴ As in the California cases, the dialogue between the plaintiffs and the court was carried out in a voice that spoke to the people

181. See Michael Cooper, *Officials, Minus One, Gather to Assail Court Ruling on Schools*, N.Y. TIMES, June 27, 2002, at B5. The *New York Times* called the decision a "particularly troubling piece of reasoning" and urged the court to "take a more expansive view of what students need to survive in the competitive world." Editorial, *Blaming the Victim*, N.Y. TIMES, June 26, 2002, at A22. The *Times's* Bob Herbert called the decision "destructive and shameful." Bob Herbert, *The Bare Minimum*, N.Y. TIMES, June 27, 2002, at A29. Even the *New York Daily News*, not known for its sensitivity to the plight of the New York City public schools, condemned the decision for "def[y]ing logic." Juan Gonzalez, *School Ruling Defies Logic*, N.Y. DAILY NEWS, June 27, 2002, at 24.

182. See, e.g., James C. McKinley, Jr., *Seeking New Momentum, McCall Accuses Pataki of Patronage Hiring*, N.Y. TIMES, Oct. 4, 2002, at B8 ("[McCall] said that Mr. Pataki's administration had shortchanged urban schools in aid for years. He also faulted the governor for supporting a ruling, by the Appellate Division of the State Supreme Court, that the state is required to provide only an eighth-grade education."); Richard Perez-Pena, *Pataki Challenges McCall on Schools*, N.Y. TIMES, Sept. 15, 2002, § 1, at 34.

183. Campaign for Fiscal Equity v. New York, 769 N.Y.S.2d 106, 111 (N.Y. 2003).

184. The perpetually embattled New York State Legislature was unable to fashion a suitable remedy. New York State Supreme Court Justice Leland DeGrasse, who presided over the *Campaign for Fiscal Equity* trial, therefore appointed a three-man panel of special masters to oversee the remedial stage of the case. See Colin Moynihan, *Panel Sets Quick Pace for Deciding School Aid*, N.Y. TIMES, Aug. 6, 2004, at B3. On November 30, 2004, the masters submitted their final report and recommendations to Justice DeGrasse, who is expected to rule on them some time in early 2005. See Greg Winter, *City Schools Need \$5.6 Billion More, Court Panel Says*, N.Y. TIMES, Dec. 1, 2004, at A1. He had not ruled on them as of January 12, 2005.

of New York. It is impossible to know whether their strong reaction against the Appellate Division's cold, economic calculus and in favor of the Supreme Court's and Court of Appeals' invocation of fundamental democratic principles was more than indignant posturing. Regardless, the provision of an education in the service of democracy stood as the mandate with which the state legislature continues to grapple.

At a more theoretical level, the California lawsuits also serve a strongly anti-elitist purpose that is deployable at numerous levels of educational inequality. As Charles Lawrence explained, in contradistinction to cases like *Gratz v. Bollinger*¹⁸⁵ and *Grutter v. Bollinger*,¹⁸⁶ which foreground elite institutions' claim of a right to maintain a diverse student body, the *Daniel* lawsuit "made subordinated minority children the plaintiffs in the case, placing the victims of racism at the center of the issue."¹⁸⁷ "Grounded in antisu-bordination theory,"¹⁸⁸ the lawsuit attacked:

the discriminatory impact of the so-called 'color-blind,' 'merit-based' system [and] exposes and demands an end to systemic, institutional racial preferences. . . . The case's caption reflects the reality of racism and gives voice to those who are really on the bottom. There is more than symbolism in this transposition of roles. There is a difference in the substantive claim, a different view of what constitutes equality, a different remedy requested, and, ultimately, a different conception of justice.¹⁸⁹

The antisu-bordination perspective breathes new life into advocacy on behalf of underprivileged students. By probing the specific nature and deficiencies of these students' educations, advocates who embrace this antisu-bordination theory are forced to root out myriad practices that are facially neutral but that implicitly derogate the capacities of certain students by further entrenching the deficiencies of their education rather than liberating them from such disadvantages.

CONCLUSION

Conversations about educational equity are notoriously path-dependent. Conceptions of what constitutes equal educational opportunity rest on age-old aphorisms and milquetoast assertions about "What Students Need." The strategies and policies that emerge from these conversations are simplistically rehashed versions of long-abandoned practices and they offer

185. 539 U.S. 244 (2003).

186. 539 U.S. 306 (2003).

187. Lawrence, *supra* note 170, at 946.

188. *Id.* at 949.

189. *Id.* at 946-47.

little new to the debate. An emerging generation of students and their advocates, frustrated with the status quo and ambitious in imagining what public education might look like in coming decades, has begun to worry about using stale definitions of educational equity and meaningful access to educational provision. *Castaneda* and *Daniel* represent prime examples of this new generation's handiwork. Indeed, many of the same lawyers who worked on *Castaneda* and *Daniel* recently settled another education equity lawsuit, *Williams v. California*, which will provide students in the state's poorest schools with, among other things, adequate facilities and school supplies.¹⁹⁰

The legislative and popular responses to the two California lawsuits suggest that the public has not abandoned public education. Rather, the response suggests that voters, politicians, and educational bureaucrats are interested in new and provocative ways of improving the system for ambitious students. Piecemeal approaches to education reform might not be the best route, but absent an overwhelming national commitment to ameliorating public education along with the ambient social circumstances to which educational inequality has long been attributed, they might be the wisest tack for education reformers to take.

Castaneda and *Daniel* arose from a statutory framework, educational context, and singular policy and political environment that were particularly amenable to the plaintiffs' claims and their proposed remedies. While such remedies and claims might not readily translate across state borders, each state's own constitutional, educational, and political context, under sufficient scrutiny by sensitive and welcoming eyes, will reveal the particular educational deficiencies most likely to generate the political will necessary to eventuate in their remediation, as evidenced by the experiences of Connecticut and New York. Defining educational equity has been a task for individual states for the last thirty years, ever since *San Antonio v. Rodriguez* abrogated any national constitutional responsibility for the quality of public education in America.¹⁹¹ Within this devolutionary framework of flexibility and experimentation, nearly anything is possible. *Castaneda* and *Daniel* challenge all advocates for educational equity to think big, unfettered by the outdated policies and ideas that have long hampered the boldest ideas for education reform.

190. See Press Release, ACLU of Southern California, ACLU and State of California Reach Settlement In Historic Williams Education lawsuit (Aug. 13, 2004), available at <http://www.aclu-sc.org/News/Releases/100740/>; see also Notice of Proposed Settlement, *Williams v. State of California*, No. 312336 (S.F. Super. Ct. filed May 17, 2000) (on file with author).

191. 411 U.S. 1 (1973). See *supra* notes 22–28 and accompanying text.